* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ Crl. Appeal No.355/2005

% Date of Decision : 14th of December, 2007

\# RAKESH SARAHA .....Petitioner
! Through : Mr. R.K. Naseem, Adv.

versus

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STATE THROUGH CBI .....Respondent
^ Through : Mr. R.M. Tiwari, Adv.

AND

Crl. Appeal No.540/2005

\# VIPIN CHAUDHARY .....Petitioner
! Through : Mr. Mukesh Sharma, Adv.
with Mr. R.K. Thakur, Adv.

versus

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STATE THROUGH CBI .....Respondent
^ Through : Mr. R.M. Tiwari, Adv.

AND

Crl. Appeal No.606/2005

\# SANTOSH SHANKAR ACHARYA .....Petitioner
! Through : Mr. Mukesh Kalia, Adv.

versus

$
STATE THROUGH CBI .....Respondent
^ Through : Mr. R.M. Tiwari, Adv.

AND

Crl. Appeal No.427/2005

KARTHIK SUBRAMANIAM .....Petitioner

! Through : Mr. K.B. Andley, Sr. Adv. with Mr. M.L. Yadav, Mr. Neeraj Gupta, Mr. Sharat Sharma and Mr. Mukesh Sharma, Advocates

versus

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STATE THROUGH CBI .....Respondent

^ Through : Mr. R.M. Tiwari, Adv.

* CORAM:
HON'BLE MR. JUSTICE B.N. CHATURVEDI
HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

: **B.N.CHATURVEDI, J.**

1. The appellants were tried and punished for offences under Sections 120-B IPC read with Sections 364A/365/368/324 & 506 IPC, under Section 364A IPC read with Section 120-B IPC, under Section 365 IPC read with Section 120-B IPC, under Section 368 IPC read with Section 120-

B IPC, under Section 324 IPC read with Section 120B IPC and under Section 506 IPC read with Section 120-B IPC by a common judgment dated 18th March, 2005 passed by the court of learned Addl. Sessions Judge, Delhi and were sentenced by an order dated 19th March, 2005 on the aforesaid charges, as under :

(a) under Section 120-B IPC read with Section 364-A/365/368/324/506 IPC – imprisonment for life and a fine of Rs.500/- each in default of payment of fine further RI for three months each;

(b) under Section 364-A IPC read with Section 120-B IPC – imprisonment for life and a fine of Rs.500/- each in default of payment of fine further RI for three months each;

(c) under Section 365 IPC read with Section 120-B IPC – imprisonment for 5 years and a fine of Rs.2000/- each in default of payment of fine further RI for

one month each;

(d) under Section 168 IPC read with Section 120-B IPC – RI for 5 years and a fine of Rs.2000/- each in default of payment of fine further RI for one month each;

(e) under Section 324 IPC read with Section 120-B IPC – RI for one year each and

(f) under Section 506 IPC read with Section 120-B IPC – RI for six months each.

2. Under challenge in these four appeals, being taken up together for disposal, are the aforesaid judgment of conviction and order of sentence.

3. The facts leading to prosecution of appellants are that one Thekkat Siddique, a permanent resident of Calicut, Kerala, was, in the year 2001 living in Abu Dhabi, UAE and working as Managing Director of Seven Stars International

Trading Est. Abu Dhabi. Sometime in the second fortnight of February 2001 he was contacted by a person introducing himself as Vijay Rathore, later identified as Virender Pant. The said Vijay Rathore represented to him that he was a NRI based in Hong Kong and wanted to meet him(Thekkat Siddique) on his visit to India to have some business talks. Vijay Rathore, in this connection, spoke to Thekkat Siddique on phone on a number of occasions. He left his phone number also with Thekkat Siddique.

4. Thekkat Siddique contemplated a visit to India commencing from 7th March, 2001 onwards. He accordingly intimated said Vijay Rathore about his intended visit. Both agreed to meet in Delhi on 11th March, 2001 to discuss about some business propositions. Thekkat Siddique reached Mumbai on 7th March, 2001 and left for his native place on the same day. He returned to Mumbai on 9th March, 2001. On 11th March, 2001 in the morning Thekkat Siddique contacted Vijay

Rathore for confirmation of their agreed meeting and asked him for a contact phone number. He was told by Vijay Rathore that on his reaching Delhi he(Thekkat Siddique) would be received by one Amar. On Thekkat Siddique reaching Delhi on the morning of 11th March, 2001, he was received by said Amar, later identified as Rakesh Saraha. Thekkat Siddique was taken by Rakesh Saraha from the airport to the ground floor of premises No.B-66 South Extension Part-II, New Delhi in a car where he came across with another person by the name of Vimal, later identified as Sanjay Khanna @ Chunky. Sanjay Khanna @ Chunky ushered Thekkat Siddique into a room where three other persons were already present. Those three persons were later identified as Santosh Shankar Acharya, Jayesh Doshi and Asif Sheikh. All the persons in the room, brandishing fire arms told Thekkat Siddique that he had been abducted. A tape was put over the mouth of Thekkat Siddique in order to gag him. He was

tied too. Thekkat Siddique was informed that he had been abducted and would be released only after payment of ransom amount. Thekkat Siddique was made to speak to his brother Ibrahim Thekkat, who was at the relevant time in Calicut, Kerala, to inform him about his abduction and demand for payment of ransom for his release from captivity.

5. Ground floor of premises No.B-66 South Extension Part-II, New Delhi belonged to one Satinder Bhatti, who was away from his house on 11th March, 2001. He, accompanied by some female friends, returned to his house on 12th March, 2001. On his telling that he required the house for his personal use, the abductors decided to shift alongwith Thekkat Siddique to another premises. Later in the evening Virender Pant @ Vijay Rathore @ Chotu arrived at the premises whereafter Thekkat Siddique was shifted to 12/22 Sarvpriya Vihar, New Delhi, which was being used by Rakesh Saraha, Kartik

Subramanium, Sunil Nathani and Vipin Chaudhary for their residence. At the changed venue of captivity, Thekkat Siddique was physically assaulted and threatened in order to build up pressure on him to arrange for the ransom money at the earliest. He was kept under constant threat of being killed in the event of ransom demand being not met. The initial ransom demand to the tune of U.S. $ 2 million was later reduced to U.S. $ 1 million on Thekkat Siddique repeatedly pleading for the same. At the asking of his abductors, Thekkat Siddique spoke to his people on phone to inform them about his abduction and being kept in captivity for ransom. This apart, the abductors, themselves contacted the family members of Thekkat Siddique requiring them to yield to their ransom demand of U.S. $ 1 million. They were told that one of the fingers of Thekkat Siddique had already been chopped off and if ransom amount as demanded would not be forthcoming his body would be cut into pieces.

On repeated requests from the family members of Thekkat Siddique the ransom demand was further reduced to U.S. $ 7 lacs and finally to Rs.75 lacs. The abductors gave a Dubai mobile phone number of some Abdullah to the family members of Thekkat Siddique asking them to contact him on the said mobile phone in the event of ranson money being arranged for delivery. For the identification of the receiver of ranson money at the appointed place the abductors gave the family members of Thekkat Siddique the number of a five Dirham Currency note and asked to check the currency note of that number with the receiver before handing over ransom money to him.

6. On coming to know of abduction of her husband, in view of phone calls received by her in that regard, Mst. Rahmath Siddique made a complaint through Indian Ambassador in Abu Dhabi UAE in regard to abduction of her husband, which was forwarded to the CBI.

7. With a view to secure release of Thekkat

Siddique from captivity of his abductors, a joint team of CBI and Special Cell of Delhi Police, on 18th March, 2001 raided second floor of House No.12/22 Sarvpriya Vihar, New Delhi. The rescue operation so launched was resisted by the abductors by opening fire on the members of the joint team. The members of joint team reacted by return of fire and in exchange of fire that thus ensued three of the abductors namely Virender Pant @ Vijay Rathore @ Chotu, Sanjay Khanna @ Chunky Vimal and Sunil Nathani sustained gun shot injuries and died. Appellants Kartik Subramanium and Vipin Chaudhary were apprehended from the said premises and Thekkat Siddique was got released from the captivity. On being identified by Thekkat Siddique one more abductor Rakesh Sahara @ Amar was apprehended from a blue colour Maruti Esteem Car bearing No.HR 51 B 7332 while returning to the said premises after dropping his accomplice, Santosh Shankar Acharya @ Mahesh Thorat at

Nizamuddin Railway Station. Appellant Santosh Shankar Acharya was, on 19th March, 2001 arrested at Mumbai Central Railway Station, pursuant to a disclosure statement made by his co-appellant Rakesh Saraha. Personal search of Satosh Shankar Acharya yielded recovery of a railway ticket, a platform ticket, apart from driving license and a business card of co-appellant Rakesh Saraha.

8. Primary source of sustenance for impugned conviction is the testimony of the abducted person, Thekkat Siddique(PW-11). Statements of Bhupesh Gupta(PW-3), Smt.Rashmi Gupta(PW-4), Shri I.C.Guta(PW-5), Shri Uday Keshav More(PW-18) and Shri Ramaneesh (PW-23) supply supportive evidence to prove the charges under different heads against the respective appellants. Oral testimony of aforesaid witnesses apart, certain recoveries effected from the person of appellant, Santosh Shanker Acharya, were also referred to

connect him with other abductors, including his three co-appellants, and those killed in cross firing at the place of captivity of abducted person in the course of his rescue operation by the joint team of CBI and a special cell of Delhi Police.

9. We have heard the learned counsel for the respective appellants as also Shri R.M.Tiwari, Advocate, appearing for the CBI.

10. Assailing the impugned conviction and sentence, Shri R.K.Naseem, learned counsel for appellant, Rakesh Saraha, contended that Rakesh Saraha at the time of alleged abduction of Thekkat Siddique(PW-1) did not play any role of any sort in abduction as such and that being in the employment of Vijay Rathore(since dead) as a driver, he was simply doing his duty in obedience to the command from his employer. Referring to the statement of Shri Bhupesh Gupta(PW-3) son of the landlord of the premises, Shri I.C.Gupta(PW-5), learned counsel contended that the appellant Rakesh Saraha was never seen by

him living in the tenanted premises with his co-appellants Vipin Chaudhary and Kartik Subramanium.

11. In his statement under Section 313 Cr.P.C., appellant Rakesh Saraha did admit that on 11th March, 2001 Thekkat Siddique(PW-11) was picked up by him on his arrival at Delhi Airport. In his entire statement under Section 313 Cr.P.C., at no place he states that on that date and thereafter until rescue of Thekkat Siddique(PW-11) from captivity at 12/22 Sarvpriya Vihar, New Delhi, he was serving as a driver only with Vijay Rathore. He also omitted to produce any evidence in support of his defence plea in this regard. No doubt Shri Bhupesh Gupta(PW-3) did not make mention of name of Rakesh Saraha as one of the occupants of the premises in question, omission on his part in this regard does not really imply that Rakesh Saraha was actually not sharing the accommodation in question with his co-appellants, Vipin Chaudhary and Kartik

Subramanium, during the relevant period. It is to be noticed that Shri Bhupesh Gupta(PW-3) confined his statement to the point of initial letting only of the premises to co-appellant, Vipin Chaudhary. From the statement of I.C.Gupta(PW-5), it is gathered that appellant Rakesh Saraha joined his co-appellants Vipin Chaudhary and Kartik Subramanium to stay on the second floor of premises No.12/22 Sarvpriya Vihar, New Delhi after three/four months of creation of the tenancy. According to Shri I.C.Gupta(PW-5), Rakesh Saraha was brought to him by his co-appellant Vipin Chaudhary after about three/four months of creation of tenancy to inform him that he(Rakesh Saraha) would also be staying with him in the rented accommodation. Lest he(PW-5) raise any objection against stay of Rakesh Saraha in the rented accommodation, co-appellant Vipin Chaudhary introduced him to Shri I.C.Gupta(PW-5) as his cousin. Later, not only that Shri I.C.Gupta(PW-5) found Rakesh Saraha present in

the rented accommodation whenever he visited it, Rakesh Saraha even used to come to him at times to pay rent to him and also visited him once with a plea for reduction of enhancement of future rent. If, during the relevant period Rakesh Saraha was actually living at some other address nothing prevented him from disclosing that address in the course of his examination under Section 313 Cr.P.C. He, however, neither disclosed his actual residential address, if any, other than premises No.12/22 Sarvpriya Vihar, New Delhi, nor produced any evidence to discredit the statement of Shri I.C.Gupta(PW-5) to the said effect. In view of Rakesh Saraha being one of the occupants of the premises in question where Thekkat Siddique(PW-11) was held captive for ransom, irrespective of nature and extent of role played by him, his complicity in commission of the crime is clearly evident and he was, thus, rightly held by the learned trial court to be a party to the criminal conspiracy as also an accomplice in committing

abduction of Thekkat Siddique(PW-11) for ransom.

12. Shri Mukesh Sharma, learned counsel for appellant Vipin Chaudhary, contended that the appellant could not be held to be a party to the criminal conspiracy and abduction of Thekkat Siddique(PW-11) in view of absence of evidence proving meeting of mind with his alleged co-conspirators. It was pointed out that though the premises in question was taken on rent on 1st July, 1999, he had left that premises and shifted to Mumbai in October, 1999. On the day of rescue operation, states the appellant in his statement under Section 313 Cr.P.C., he happened to visit his friend at the premises in question on his return journey to Mumbai from Bijnaur, UP - his home town. It was argued by learned counsel that the appellant was throughout unarmed and the fact that he had nothing to do with the abduction and confinement of Thekkat Siddique(PW-11) is evident from the fact that he

and co-appellant Kartik Subramanium had pulled him back from the line of firing resoted to at the time of rescue operation.

13. Second floor of 12/22 Sarvpriya Vihar, New Delhi, being taken on rent by the appellant from Shri I.C.Gupta(PW-5) is proved beyond doubt. Ex.PW-3/B is the lease agreement executed between appellant Vipin Chaudhary and I.C.Gupta(PW-5) in respect of premises in question. Ex.PW-3/C executed between present appellant and the wife of Shri Bhupesh Gupta(PW-3) is in regard to fixtures in the leased premises. Though the appellant in his statement under Section 313 Cr.P.C. stated that he had come to visit his friend at the rented accommodation, he did not name that friend. From the statements of Bhupesh Gupta(PW-3) and I.C.Gupta(PW-5), it is established that during the relevant period, apart from present appellant, second floor of 12/22 Sarvpriya Vihar, New Delhi, was being used by co-appellants Rakesh Saraha and Kartik

Subramanium for their residence. In the circumstances, either of them could be that friend of this appellant who he claims to have had come to visit. His plea in this regard would, however, lacks conviction unless he is able to show from the evidence on record that he had actually shifted from the rented accommodation to Mumbai in October, 1999 and had been staying in Mumbai only eversince. The appellant omitted to disclose his Mumbai address, if any. He also did not produce any evidence in support of his plea that he had left the rented accommodation in October, 1999 and had shifted to Mumbai thereafter. No doubt Thekkat Siddique(PW-11) stated that the present appellant was noticed present only on the last one or two days, his statement in this regard cannot be used to lend support to the defence plea that he was actually not living there and had come to that place only to see his friend on his way back to Mumbai from Bijnaur, UP. His joining the abductors at a later stage could neither save him

from being held as a party to criminal conspiracy and confinement of Thekkat Siddique(PW-11) for ransom after abduction, nor that he was actually not living there and that he happened to be present there per chance. There is sufficient evidence in the nature of statements of Bhupesh Gupta(PW-3), Smt.Rashmi Gupta(PW-4), and Shri I.C.Guta(PW-5) coupled with lease papers Ex.PW-3/B and PW-3/C, that the place of captivity of Thekkat Siddique(PW-11) was under his tenancy and the same continued to be so during the relevant period as well. His presence at the spot though at a later stage leads to conclude, in the absence of any contrary evidence to the effect that he had shifted in October, 1999 to Mumbai and had been living there ever since, that he was very much a party to the criminal conspiracy. Further, even if his defence plea of having shifted to Mumbai in October, 1999 is accepted, that by itself could not be a reason to find him totally unconnected with the commission of crimes in

question. Even while staying in Mumbai, he could have still been a party to the criminal conspiracy and his arrest from the place of captivity of Thekkat Siddique(PW-11) bears testimony to this fact. In a closed premises like the 12/22 Sarvpriya Vihar, New Delhi where Thekkat Siddique(PW-11) was held in captivity after abduction and where there were other persons keeping guard against any attempt on the part of abducted person to escape therefrom, it was not necessary that all the members of the group were to be moving around inside the house carrying some kind of arms or the other. Moreover, it could also be a matter of non-availability of weapon for every member of the group. Thus, simply because the appellant was not carrying any arm it cannot be concluded that he was not a party to the criminal conspiracy. As stated by Thekkat Siddique(PW-11), he was all the time, during the course of his captivity, being tortured and threatened by one member of the group or the

other. In such a situation, it is difficult to accept that this appellant could have remained unaware of the criminal conspiracy and abduction of Thekkat Siddique (PW-11) for ransom.

14. For an offence under Section 120-B IPC, the prosecution need not necessarily prove that the present appellant, the co-appellants and others expressly agreed to abduct Thekkat Siddique(PW-11) and keep him in confinement for ransom -- such an agreement may be proved by necessary implication. In the present case, action/actions of the co-appellants and those killed in the course of firing by police during rescue operation would be relevant under Section 10 of the Evidence Act against the present appellant in concluding that he was also a party to the agreement to abduct and keep Thekkat Siddique(PW-11) in confinement for ransom.(see **Mohd.Hussain Maniar & Another Vs. State of Maharastra**, 1987 Crl.L.J. SC 588 and **Kehar Singh & Others Vs. State(Delhi Admn.)** AIR

1988 SC 1883).

15. No doubt, Sh. Thekkat Siddique admitted that Vipin Chaudhary and Kartik Subramanium had pulled him back into a room when firing started, he however denied that it was with a view to save him as he added that he could not expect such a conduct on their part. Moreover, even if it be taken that the present appellant or co-appellant Kartik Subramanium did not want him (PW-11 Thakket Siddique) to be injured or killed in firing, that in no way works to wipe out their complicity in being co-conspirators in abduction and captivity of the victim for ransom.

16. On the basis of evidence on record, the present appellant was, thus, rightly held by the learned trial court guilty of conspiracy and abduction of Thekkat Siddique(PW-11) for ransom and there appears no reason to take a different view.

17. Like co-appellant Vipin Chaudhary, on behalf of appellant Kartik Subramanium also, it

was argued that he had no connection of any sort with second floor of premises No.12/22 Sarvpriya Vihar, New Delhi where Thekkat Siddique(PW-11) was kept confined for ransom. In this regard, it was contended that as per lease agreement Ex.PW-3/B and Ex.PW-3/C, the premises in question were let out to co-appellant Vipin Chaudhary only. Referring to the statement of Shri I.C.Guta(PW-5), where he deposed that he and/or co-appellant Rakesh Saraha used to come to pay rent to him, it was pointed out that the witness did not name the present appellant in this regard in his statement under Section 161 Cr.P.C. to the police and that his contrary statement before the court was only an improvement to falsely implicate the appellant. Shri I.C.Guta(PW-5), apart from stating that the appellant and/or Rakesh Saraha used to come to him to pay rent and further that both of them had also approached him with a request for reduction of enhancement of future rent, he has also testified

that the present appellant had accompanied co-appellant Vipin Chaudhary even at the time when the premises in question were taken on lease and Vipin Chaudhary had executed the lease papers Ex.PW-3/B and Ex.PW-3/C. There is statement of Shri Bhupesh Gupta(PW-3) also to the effect that apart from accompanying Vipin Chaudhary at the time of initial letting of the premises, this appellant used to bring the cheques for payment and that he continued to live in the premises along with co-appellant Vipin Chaudhary until March, 2001 when this incident had taken place. In view of the fact that this appellant was arrested from the rented accommodation along with Vipin Chaudhary in the course of rescue operation, in the absence of any plausible explanation for his presence there at that time, there appears no reason to disbelieve the statements of Shri I.C.Guta(PW-5) and Shri Bhupesh Gupta(PW-3) to find that this appellant was also one of the occupants of that part of the house.

18. It was further contended by Shri K.B. Andley, Senior advocate that the present appellant, according to prosecution version, appeared on the scene only when Thekkat Siddique(PW-11) was shifted to 12/22 Sarvpriya Vihar, New Delhi and in view of there being no evidence that he caused any injury to the victim rather he, in terms of statement of Thekkat Siddique (PW-11) saved him by pulling him back into a room from the line of firing, conviction and sentencing of the appellant for criminal conspiracy and abduction of Thekkat Siddique for ransom, are liable to be reversed.

19. It is evident that the abducted person remained in captivity from 12th March, 2001 to 18th March, 2001 before being rescued by the joint team, at 12/22 Sarvpriya Vihar, New Delhi which was being shared by the present appellant with co-appellants Vipin Chaudhary and Rakesh Saraha for their residence and PW-11 Thekkat Siddique was being tortured by some of his

accomplices and kept under constant threat to his life within his full knowledge and sight. It really makes no difference if he joined his co-conspirators at a later stage or if he himself did not cause any injury to the victim. Since the present appellant was also a party to the criminal conspiracy to abduct Thekkat Siddique and to keep him in confinement for ransom, nature and extent of his role in commission of such crimes are immaterial. As held earlier while dealing with the appeal of co-appellant Vipin Chaudhary pulling back of Thekkat Siddique from the line of firing, did not necessarily mean that he was alien to the criminal conspiracy and unconcerned with Thekkat Siddique's captivity for ransom. Thus it does not really help the appellant in securing acceptability to his plea that since he alongwith co-appellant Vipin Chaudhary saved the life of Thekkat Siddique by pulling him back from the line of firing, he could not be taken to have been a party to the commission of crimes in question.

20. Mr. K.B. Andley, learned Senior counsel lastly argued that the appellant appeared on the scene only after Thekkat Siddique had been abducted and put in confinement for ransom. According to him thus, the offence which can be held to have been committed by him would be one covered under Section 365 IPC only and he could not have been held guilty of an offence punishable under Section 364 A IPC. In this connection he referred to a decision of Supreme Court in **Suman Sood @ Kamaljeet Kaur vs. State of Rajasthan**; (2007) 2 Supreme Court Cases (Cri) 637 and pleaded for conversion of sentence of imprisonment and fine under Section 364-A IPC to Section 365 IPC against the appellant. It is however to be noticed that even though this appellant joined his accomplices at a later stage, in view of the fact that he alongwith his co-appellants Vipin Chaudhary and Rakesh Saraha allowed the premises meant for their residence to be used to hold Thekkat Siddique after his abduction as captive for ransom

and played an active role as his other accomplices, in keeping the victim under confinement for ransom, he renders himself liable to be punished under Section 364A IPC read with Section 120B IPC. It being a case where Thekkat Siddique was kept in confinement to secure payment of ransom money and as present appellant happened to be a party to the criminal conspiracy to abduct and hold the abducted person in captivity for ransom, he was correctly held by the learned trial court guilty of committing offences punishable under Section 364A IPC read with Section 120B IPC.

21. On behalf of Santosh Shankar Acharya, Mr. Mukesh Kalia, Advocate contended that unlike co-appellants Vipin Chaudhary and Kartik Subramanium, who were shown to have been arrested from the place where Thekkat Siddique was kept in captivity, he was allegedly arrested on the next day at Mumbai. Mr. Kalia, argued that the manner of arrest of the appellant itself raises

doubt about the correctness of prosecution version. He pointed out that no witness of arrest of the appellant on 19th March, 2001 at Mumbai Central Railway Station by Mumbai Crime Branch Police is produced. Learned counsel further argued that in view of doubt regarding manner of arrest of the appellant, even the recovery of the railway ticket, a platform ticket, a driving license, and business card belonging to co-appellant Rakesh Saraha is rendered questionable. Learned counsel further submitted that though the CBI had obtained from the Court concerned at Mumbai a transit remand for two days in respect of the appellant, he was brought to Delhi by air on the very day of his arrest but not produced before the court of Metropolitan Magistrate concerned at Delhi on 20th March, 2001 and no evidence has been adduced to prove that the appellant was kept in muffled face. Since the appellant, argued the learned counsel, was not arrested from the spot and he

was not known to Thekkat Siddique, PW 11 prior to his abduction, the prosecution was required to fix his identity by seeking a test identification parade in relation to him. It was argued that the prosecution has failed to prove on record that it had applied for appellant's test identification parade, in the absence of which the complicity of the appellant in commission of crimes for which he was found guilty, cannot be held established beyond doubt.

22. Mr. R.M. Tiwari, Adv. appearing for CBI on the other hand contended that as transit remand for 19/20th March, 2001 had already been granted by the concerned Mumbai Court there was no necessity of the appellant being produced before the Metropolitan Magistrate concerned at Delhi on 20th March, 2001. He sought to refer to the statement of Inspector Uday Kumar More, PW-18 to support the prosecution case that the appellant was arrested pursuant to a disclosure by co-appellant Rakesh Saraha, on 19th March,

2001 on his arrival at Mumbai Central Railway Station by August Kranti Rajdhani Express and that a railway ticket, a platform ticket, a driving license and a business card of co-appellant Rakesh Saraha were recovered from him on his personal search. Mr. Tiwari with the help of decisions of Supreme Court in **Jadunath Singh and Anr. vs. The State of U.P.**; 1970(3) Supreme Court Cases 518; **Daya Singh Vs. State of Haryana**; (2001) 3 Supreme Court Cases 468; **Dana Yadav @ Dahu & Ors. Vs. State of Bihar**; (2002) 7 Supreme Court Cases 295 and **Sarwan Singh Vs. State of Punjab**; (2003) 1 Supreme Court Cases 240 pleaded that where an accused is known to a witness, failure to hold test identification parade of the accused would not render the evidence of such a witness identifying the accused in the court during the course of his deposition, inadmissible.

23. Learned counsel for the appellant appears to be right when he contends that the arrest of

the appellant, the way it is claimed by prosecution, is not clearly proved. There is solitary statement of Inspector Uday Kishore More, PW-18 in regard to arrest of the appellant in Mumbai on 19th March, 2001. According to the statements of witnesses including Dy. Superintendent of Police Sh. Ramnish, PW-23, the joint team raided second floor of premises No.12/22 Sarvpriya Vihar, New Delhi around 4.30 pm on 18th March, 2001. Apart from securing release of Thekkat Siddique from captivity, the raid also led to apprehension of co-appellants Vipin Chaudhary and Kartik Subramaniam from the premises. The apprehension of co-appellant Rakesh Saraha was effected a short while thereafter when he arrived at the premises in a car from outside. It was co-appellant Rakesh Saraha who, according to the prosecution, disclosed that he had dropped this appellant at Nizamuddin Railway Station as he was to board August Kranti Rajdhani Express to go to Mumbai. Rakesh

Saraha is also claimed to have had disclosed the coach and berth number as well. It was only after gathering the said information from co-appellant Rakesh Saraha that a request to effect arrest of the appellant was made to the Joint Director, CBI at Mumbai. However, contrary to prosecution case, Inspector Uday Kishore More, PW-18 affirmed that necessary information to effect arrest of the appellant was initially received by his superior officers, which was passed on to him at about 2.00 pm and he immediately thereafter proceeded to Crime Branch office of Mumbai Police and on reaching there formed a team with officials of the Crime Branch. He however did not accompany the Crime Branch officials to the Bombay Central Railway Station to effect arrest of the appellant as he was told to stay back in the Crime Branch office only. He testifies that he stayed in the Crime Branch office until 4.15 pm or 4.30 pm by which time the appellant was brought to Crime Branch office by

Mumbai Police and handed over to him. The entire statement of this witness to the said effect is however unacceptable since it runs totally contrary to the prosecution case as reflected from the statements of CBI officials constituting the joint team. Mumbai bound August Kranti Rajdhani Express starting on 18th March, 2001 from New Delhi was to reach Mumbai on the morning of 19th March, 2001 at about 10.30 am only. Thus, there could be no question of present appellant, if he really travelled by that train on 18th March, 2001, reaching Mumbai before 4.15 or 4.30 pm on the same very day to be arrested there at Mumbai by Crime Branch of Mumbai Police. Inspector Uday Kishore More, PW-18 himself admitted in his cross-examination that he had no personal knowledge in regard to the time and place of arrest of the appellant. No official from the Crime Branch of Mumbai Police has been examined by CBI to prove that the appellant was arrested at Bombay Central

Railway Station on 19th March, 2001. The prosecution thus fails to establish that the present appellant was arrested at Bombay Central Railway Station on 19th March, 2001. It is however worth taking note of that even though the arrest of the appellant from Bombay Central Railway Station is not proved, his arrest as such from Mumbai is not in doubt as on his arrest he was produced before the concerned court at Mumbai which granted a transit remand in respect of him for 19/20th of March, 2001.

24. The appellant was brought to New Delhi from Mumbai by air on 19th March, 2001 itself and produced before the Metropolitan Magistrate concerned at New Delhi on 21st March, 2001. Learned counsel for the appellant contended that once the appellant was brought to New Delhi on 19th March, 2001, a transit remand for two days from Mumbai court notwithstanding, he should have been produced before the court of Metropolitan Magistrate concerned on the next

day i.e. 20th March, 2001. His non-production on the next day was made a ground to contend that the CBI purposely kept the appellant in its custody on 20th March, 2001 so as to show him to Thekkat Siddique, PW-11 to enable that witness to identify him. The learned counsel referring to the statement of Thekkat Siddique, PW-11 pointed out that he had admittedly visited CBI office on several occasions during the period of his stay in Delhi upto 24th March, 2001. It is however to be noted that but for admitting that he had visited CBI office several times, Thekkat Siddique (PW-11) did not specify particular dates of his visits. In the circumstances it is rendered difficult to conclude that at least one of his such visits was made on 19th March, 2001, after the appellant was brought to CBI office from Mumbai or on 20th March, 2001 when the appellant could have been shown to him.

25. From the statement of Ramaneesh, Investigation Officer, PW-23 it is gathered that a

test identification parade in respect of present appellant was applied for before the court of Metropolitan Magistrate concerned but the appellant refused to participate in such test identification parade. This part of Investigating Officer's statement remained unchallenged on behalf of the appellant in the course of his cross examination. Thus it is a case where the prosecution though applied for test identification parade, the same could not be held in view of refusal on the part of the appellant to participate in it. In the circumstances, it is not a case where the prosecution did not seek to get the identity of the appellant fixed by way of a test identification parade and that it sought to bank upon the identification of the appellant by Thekkat Siddique, PW-11 before the court for the first time. The identification of an accused in the course of test identification parade, though a primary evidence is not a substantive one, it is of a corroborative nature only as it is the evidence

concerning identification of an accused by a witness/s before the court which alone is of substantive nature. Laying down the law on test identification parade, the Supreme Court in Dana Yadav (supra) ruled that even where test identification parade is not held and the witness/s identified the accused for the first time before the court, such evidence relating to identification does not become inadmissible and cannot be discarded on the ground of not being preceded by a test identification parade if the court finds the same to be trustworthy. At the same time, however, it was also laid down that identification of accused before court should not ordinarily be made the basis of conviction unless corroborated by previous identification by test identification parade or any other evidence, though there could be exception to this rule.

26. In terms of Thekkat Siddique, PW-11's testimony the appellant remained present on the scene right from the date of his abduction upto

18th March, 2001 and played a leading role in subjecting him to torture as also extending threat to him to make him satisfy their ransom demand. Thekkat Siddique, PW-11 was thus in a position to have had taken a hard and close look at the appellant continuously for a period of about 7 days and was thus unlikely to commit a mistake in correctly identifying him before the court. It cannot be lost sight of that Thekkat Siddique, PW-11 is a person residing and working in Dubai, UAE. He appears to have had come to India to visit his native place and also to make use of his trip for business purposes. He, in the absence of any motive which is not reflected from record, could have had no reason to falsely implicate the appellant by identifying him before the court simply at the behest of officials concerned of CBI. There would thus appear no reason to discard his evidence regarding identification of the appellant as one of those who played a role in his abduction and captivity. We

thus find no reason to arrive at a finding different from one recorded by the trial court in regard to appellant's conviction under Section 364A IPC read with Section 120-B IPC.

27. The appellants were charged under six different heads and convicted and sentenced separately under each head. Sections 365, 368, 324 and 506 IPC constitute distinct offences. However, where a conviction and sentence is recorded under Section 364-A read with Section 120-B IPC, no simultaneous conviction and sentence under Section 365 and 368 IPC would be justified. The appellants in the present case thus while being held guilty under Section 120-B IPC read with Section 364-A and under Section 364-A IPC read with Section 120-B IPC could not have also been convicted under Section 365 and 368 IPC as well. Further, causing hurt or extending threat to cause death or hurt to an abducted person is one of the necessary ingredients of an offence punishable under Section 364-A IPC and

therefore no separate conviction and sentence for causing hurt or threatening to cause death or hurt to Thekkat Siddique, PW-11 could have been recorded under Section 506 IPC. From the statement of Thekkat Siddique, PW-11 though it appears that he was physically tortured and hurt was caused to him in the process by some of the appellants or their accomplices, no medical report regarding nature of injuries, if any, on his person could be brought to our notice by learned counsel for CBI nor there is any mention of the same in the impugned judgment. Noticeably, the learned trial court did not record any finding in the impugned judgment in regard to commission of an offence punishable under Section 324 read with Section 120-B IPC. It however, proceeded to convict the appellants for the same and sentenced each one of them to one year RI. A better application of mind would have saved the learned trial court from committing the said mistakes.

28. The appeals are, in the result partly allowed to the extent that the conviction and sentence of the appellants under Sections 365, 368, 324 and 506 IPC shall stand set aside. However, upholding the conviction and sentence against each appellant for offences punishable under Section 120-B read with Section 364-A IPC and Section 364-A read with Section 120-B IPC as recorded by the learned trial court, all the four appeals are dismissed.

(B.N.CHATURVEDI)
JUDGE

(G.S. SISTANI)
JUDGE

December 14, 2007
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